In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1379

INTERNATIONAL METAL SPECIALTIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A6) is reported at 433 F. 2d 870. The Board's decision and order (A2–A33) [1] are reported at 172 NLRB No. 39.

JURISDICTION

The judgment of the court of appeals (Pet. App. A7–A8) was entered on November 30, 1970. The petition for a writ of certiorari was filed on February 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "A." references are to the appendix filed in the court of appeals.

418-994—71——1

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that the employer violated Sections 8(a) (1) and 8(a) (5) of the National Labor Relations Act.

2. Whether the Board properly ordered the employer to bargain with the union as a remedy for his violations of Sections 8(a) (1) and (5) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.), are set forth in Pet. App. B1–B2.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In May 1966, Shopman's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, began to organize the production and maintenance workers employed by International Metal Specialties, Inc. (A27; A129). By June 14, 15 [2] of the Company's 29 employees [3] had designated the Union

[2] Employee Wheatley was included in the 15. He signed a card in May 1966, but the card was never received by the Union. The Board found that Wheatley had given it to another employee with the intention that it be submitted to the Union, and thus counted him. (A27, n. 7; 189–190.)

[3] Thirty-two persons were employed by the Company. The Board excluded three from the unit: Thomas DeRosa, the brother of the plant manager (A254), because, during the relevant period, he was on military leave (see *Greystone Knitting Corp. and Donwood, Ltd.*, 136 NLRB 573, 575; *Conso Fastener Corporation*, 120 NLRB 532, 542; *Supersweet Feed Company, Inc.*, 62 NLRB 53,

as their bargaining representative (A27). The Union sent a telegram to the Company stating that it represented a majority of the employees and requesting recognition (A27–28; 299). The Company refused this request, as well as a later one.[4]

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55); and George Garguilo and John Shields, who were found to be supervisors.

The evidence on which the findings of supervisory status were based is as follows: *Garguilo* is the brother-in-law of the Company's general manager and the son-in-law of the secretary of the Company (A12, n. 8, 51, 245). He is paid substantially more than any employee, receiving $4.74 per hour, or $1.50 per hour more than the highest paid unit employee (A12, n. 8, 54). Other employees, Plant Manager DeRosa, and Garguilo himself testified that he assigns, directs, and checks the employees' work (A12, n. 8, 52–53, 71–75, 106–107, 173–174, 180–182, 250), and he is referred to by the employees as the "second foreman" (A106). Employees request time off from Garguilo (A175), and, aside from DeRosa, who spends approximately half his time doing office work, the Company has no other person present in the shop to supervise the 29 employees (A184).

As to *Shields*, Plant Manager DeRosa referred to him as "subforeman" and stated that Shields assigned and directed work, transferred employees from work assignment to work assignment, and received requests from employees for time off (A26; 45–50). Other employees corroborated this testimony, adding that Shields was referred to as "foreman," was in charge when DeRosa was not there, and was responsible (along with Garguilo) for such things as industrial safety and employee requests for time off (A26, 78, 80–85, 108–109, 174–176, 208, 211–212). Shields acknowledged many of these responsibilities, pointing out that he was capable of running every machine in the shop (A231, 241–242). Shields was paid $4.20 per hour, substantially more than the highest paid unit employee. (A50–51, 54).

[4] The Union renewed its recognition request at a meeting with Company counsel on June 22 (A28), by which time it had acquired an additional authorization card, that of employee Tortello, which was mailed on June 18 (A27, n. 7; 191).

On June 15, Gabriel DeRosa, the plant manager, met with the employees (A14–15, 11–12; 162–164, 299). He related that he had received notice of the Union's interest in representing them, and discussed present employment benefits provided by the Company and the effect unionization would have on those benefits (A163–164, 229). After he listed the benefits, DeRosa warned the employees that, since the shop was small and a union costly, if the Union came in, the benefits would be reduced or even lost and he would be forced to close the shop (A25, 11–12; 165, 229, 96–97, 162–170, 172–173).[5]

On June 20, Supervisor John Shields called the employees together. He suggested that "if they have any grievances to form a committee" and "go to the office to Mr. Gabriel DeRosa and tell him what you want." (A. 26–27, 14; 171, 123–124, 166–169.)

Earlier, on May 12, the Company granted pay increases to 13 employees (A25–26; 55, 324). This action coincided with the inception of the Union's organizing drive, of which management was aware (A25–26; 57–58).

B. THE DECISIONS BELOW

The Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a)(1) of

[5] On May 11 Supervisor Garguilo, after witnessing employee Cruz return a signed authorization card to a union organizer, approached Cruz at his work bench and questioned him about a union meeting (A12; 87–90). Garguilo stated that the Union was not good for a small shop like the Company's, that he "knew plenty small job they had to close their door because the union came in," and that "if the Union come here I think we have to close the door like all small shop" (A25, 12; 90–92). The conversation ended with Garguilo asking Cruz not to influence any other employees (A25, 12; 93).

the Act by threatening employees with loss of employment benefits and plant closure in an effort to undermine the Union's support (A25, 12). In disagreement with the Examiner, the Board found that the Company further violated Section 8(a)(1) by granting wage increases to 13 employees and suggesting that employees obtain satisfaction of their grievances by abandoning the Union and dealing directly with management (A25–26); that the Company violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union, since the Union had been designated as bargaining agent by a majority of employees in an appropriate unit (A27–29); and that the Company "by engaging in unfair labor practices during the pre-election period [made] it impossible to hold a free and fair election" (A29). The Board ordered the Company, *inter alia,* to bargain with the Union (A32–33).

The court of appeals upheld the Board's decision and enforced its order (Pet. A1–A6).

ARGUMENT

1. Petitioner contends (Pet. 7–10) that the court below gave undue weight to considerations of "expertise" in upholding the Board's factual findings as to the supervisory status of Garguilo and Shields and the cards of Wheatley and Tortello (see ns. 2 and 3, *supra*). The court expressly stated that it had reviewed the Board's findings on these issues to determine if they were "supported by substantial evidence on the record considered as a whole, taking into account whatever in the record fairly detracts from its weight, but giving due regard to the Board's expertise" (Pet. App. A3). This is pre-

cisely the review required by *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474. As the court's opinion shows, it sustained the Board's findings on each of the issues only after it carefully considered, and found adequate support for them in the record evidence (Pet. App. A4–A5).

2. Nor is there merit to petitioner's contention (Pet. 6–7, 10–14) that the court below misapplied *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575. Petitioner asserts that its violations of Section 8(a)(1) were not sufficiently serious to require a bargaining order. But this determination necessarily turns on the particular facts of each case, and is not a matter for this Court. Moreover, as the court below correctly noted (Pet. App. A6), the violations here were more serious than those in *Sinclair Co.* v. *National Labor Relations Board,* 395 U.S. 575 (a companion case to *Gissel*), where this Court upheld the Board's bargaining order. In *Sinclair,* the threats of plant closure were implicit, whereas here they were explicit and accompanied by other violations of Section 8(a)(1). The circumstances of the present case justified a bargaining order.[6]

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[6] Although the Board's decision herein predated *Gissel*, there is no need to remand the case to the Board for reconsideration. For here, as in *Sinclair*, the Board found that petitioner's unfair labor practices "make it impossible to hold a free and fair election" (A29), which fully supports its decision to order bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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